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IN THE

Supreme Court of the United States

October Term, 1964

No. 227

MARGARET DAVIS, *et al.*,

Petitioners,

vs.

PAULINE D. MCLAUGHLIN, Administrix *de bonis non* of the Estate of Ingram M. Stainback, Deceased.

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit Court.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit Court.

To the Honorable Chief Justice and Associate Justices of the United States Supreme Court:

This is an action brought to enforce a rejected probate creditor's claim filed against the Estate of Ingram M. Stainback, deceased.

Petitioners, the plaintiffs and appellants below, respectfully pray that a Writ of Certiorari issue to review a Judgment of the U. S. Court of Appeals for the Ninth Circuit entered April 2, 1964. Petition for Rehearing has been denied. Said Judgment affirmed a Dismissal of petitioners' action With Prejudice, and was entered by the U. S. District Court for the District of Hawaii on January 9, 1963.

Opinion Below.

The Opinion of the Circuit Court dated January 22, 1964, is printed in *Appendix "A"* annexed to this petition. The Order appealed from is set out in said Opinion.

Jurisdiction.

Appellee's "Statement of Facts conferring Jurisdiction" correctly shows that same is based on diversity of citizenship and amount in controversy. (28 U. S. C. A. Sec. 1332.) [See Complaint Par. 1, Tr. p. 3.]

The alignment of the heirs, existing at the time of the filing of said action in the United States District Court of Hawaii on December 8, 1961, was that Judge J. Frank McLaughlin, the then administrator, was a resident of the Territory of Hawaii; whereas plaintiff heirs were residents of various States within the continental limits of the United States: petitioners Georgia McPheeters and Glady O'Connell were residents of California; petitioner Mamie White Avery was a resident of Kansas and, each of the remaining petitioners were residents of Missouri.

It now also appears that these petitioners have been denied the benefits of due process of law. (U. S. Constitution, XIV Amendment.) An additional ground of Jurisdiction thereby further appears.

Statute Involved.

This case involves the interpretation of *Rule 41 of Rules of Federal Procedure*, which pertains to dismissal of actions. More particularly it involves the interpretation of *Rule 41(a)(1)* and *Rule 41(a)(2)* as same were applied by the District Court and the Court of Appeals to petitioners facts.

Statement of Facts.

Petitioners adopt the Chronological statement of facts contained in the Appellate Courts opinion produced at pages 1, 2, 3 and 4 of Appendix "A". Since as the Court has pointed out, Mr. Houston's brief on their behalf was inadequate in that it contained no statement of facts from petitioners' point of view, nor did it adequately cover the 17 points of error he appears to have relied on for their benefit, a further and supplemental statement of facts appears necessary.

This action was filed November 8, 1961 in the District Court of Hawaii by E. D. Crumpacker, Esq petitioners original attorney. He had accepted his retainer on a straight contingent fee basis.

The pleadings he prepared and filed in the Federal District Court of Hawaii, were probably not his best effort. It now appears possible that the case might better have been instead filed originally in the Hawaiian State Circuit Court, this Mr. Houston attempted to do.

In the original Complaint filed by Mr. Crumpacker, Cook Trust Co., Administrator of the Estate of Cecile Stainback was not joined either as a plaintiff or as a defendant. After this action was filed, Judge McLaughlin, Administrator of the Estate of Ingram W. Stainback, dec'd, himself died, but thereafter no Successor Administrator was immediately appointed.

Defendant's first response to petitioners' complaint took the form of a "Motion to Dismiss or for More Definite Statement." When this motion was filed on June 15, 1962, Mr. Crumpacker made no effort to defend his pleadings, but instead on July 6, 1962, and before any Hearing on the Motion, gave Notice of his

intention to withdraw as petitioners' attorney. (Appendix A, p. 3.)

This action on his part was opposed both by petitioners and (surprisingly) by defendants.

After a hearing, at which Georgia McPheeters was the only one of the 18 petitioners present, the Court announced originally that the matter of permitting his withdrawal would be set over to September 4, 1962 (see Opinion, Appendix "A", p. 4), nevertheless, on July 26, 1962 he was permitted to withdraw.

In the course of his efforts to persuade the Court to permit him to withdraw over objections, Mr. Crumpacker made statements and disclosures in open Court which it is believed influenced the entire subsequent cause of the litigation.

His remarks directed to Judge Pence indicated that he not only did not care to proceed further, but appears to have pointed out alleged "defects" and weaknesses in petitioners' case which only defendants themselves might properly have raised. In his haste to be relieved as counsel, it appears that he very effectively sabotaged petitioners' entire law suit.

Petitioners Were Unaware of What Was Happening.

During the period of time between July 26th and August 30, 1962 petitioners were entirely without an attorney. They were far removed from the forum of litigation, and all were physically on the mainland, and had no knowledge with regard to anything that Mr. Houston was doing.

Specifically, they had no reason to believe that any steps might be taken to Dismiss their action for any

purpose whatsoever, and specifically, no permission was ever granted to Mr. Houston or any other attorney to have done so under any circumstances.

When Mr. Brahan Houston took over on August 30, 1962, he was faced with the problem of attempting to repair the damage Mr. Crumpacker had caused, and attempting if possible, to select a proper forum for the proceedings.

On this date, however, the matter was not yet at issue. No pleadings other than the "Motion to Dismiss, etc." had been filed by defendants. There was as yet no Answer, nor any Counter-claim or any Cross-Complaint demanding affirmative relief on file. It appears that defendant's preparation had not proceeded beyond the point of taking depositions in the City of Honolulu where the action had been filed, on December 8, 1961.

For the purpose of cooperating with defendants Mrs. McPheeters had voluntarily come to Honolulu from Los Angeles on her own expense and had given her deposition on the 27th and 28th of January, 1962.

Petitioners Can Only Guess at What Mr. Houston Was Attempting to Accomplish.

It appears to be practice for an attorney in the early stages of litigation, to Remove his Cause of Action from the State to the Federal Court, or vice versa from the Federal Court to the State Court, depending upon what the facts appear to be. Mr. Houston appears in good faith to have believed that the case, in the posture which existed on August 30, 1962 should properly have been removed to the State Court because of possible Probate problems involved. His right to such removal should have been unchallenged.

This may account for Mr. Houston's filing of the Motion for Voluntary Dismissal on August 30, 1962, pursuant to *Rule 41(a)(1)* and his filing, on the same day of the new case in the Hawaiian State Circuit Court based on the same claim, but naming Cook Trust Co. Administrator of the Estate of Cecile Stainback, dec'd as an additional defendant, who was thus joined in the litigation for the first time. (Appendix, p. 4.)

On September 7, 1962, appellees objected to this attempted voluntary dismissal by moving to strike the Notice of Dismissal or in the alternative for terms and conditions under *Rule 41(a)(2)*. The Order appealed from followed in due course as the result of this motion. (Appendix, pp. 4 and 5.)

Additional Facts Exist.

Other important facts should also be noted: *i.e.*

A. There is a witness available who was personally present when Governor Stainback tore up and thereby destroyed the will of Cecile Stainback, his predeceased wife, shortly before her funeral;

B. True copies of the will he thus destroyed are available and can be offered in evidence, with proper foundation laid for its offer.

C. Cecile Stainback and Ingram Stainback had been married approximately twenty-eight (28) years at the time of her death; the property left by her was substantially all in the nature of community property.

D. When Governor Stainback, himself died in 1961, his Probate Estate was appraised at approximately $1,000,000.00.

E. Pauline D. McLaughlin, Administratrix *de bonis non* of the Estate of Ingram Stainback, apparently had not yet been appointed on August 30, 1962. The office of Administrator was vacant when Mr. Houston filed his first Appearance.

F. Governor Stainback was a person of great wealth and influence. His administrator and counsel appear to have been highly skilled members of the Bar at all stages; on the other hand, petitioners are all people of little means. The haste displayed by Mr. Crumpacker in abandoning his responsibilities as petitioners' attorney is totally unexplained. Mr. Houston, his successor, appears to have sacrificed his health in attempting to cure the debacle which resulted from Mr. Crumpacker's precipitate abandonment of petitioners' cause.

These facts all affirmatively appear from the record to be produced.

Reasons for Allowance of the Writ.

The U. S. Supreme Court may review any final judgment or decree of the Circuit Court of Appeals. 10 Am. Jur., Certiorari, p. 529; 27 R. C. L., p. 1.

And certiorari may issue, if the exigencies of the case are such that applicants once had a remedy which by the force of special circumstances has been lost and which address themselves to the discretion of the court. *United States v. Dickenson*, 213 U. S. 92, 53 L. Ed. 711, 29 S. Ct. 485; 10 Am. Jur., Certiorari, 532.

It appears that without any discernible fault of their own, petitioners now find themselves in a position from which there is no escape unless the requested Writ of Certiorari Issue.

Plainly, it never occurred to Mr. Houston that his offer of voluntary dismissal under *Rule 41(a)(1)* could ever in this early stage of the case be tortured into a situation which could involve the possible imposition of any of the conditions contemplated by *Rule 41(a)(2)*, or any Order of Court, or any of the procedures which the District Court subsequently insisted on adopting and applying to these facts. (Appendix A, p. 5.) [Tr. pp. 63-64.]

Questions Presented.

The "Statement of Points relied on by Appellants" [Tr. pp. 122-126 incl.] suggests seventeen (17) errors. It is unfortunate that Appellants' Brief as filed by Brahan Houston was insufficient to present same adequately. The District Court's opinion recognized only two claimed errors.

Petitioners respectfully contend that said issues cannot be compressed into only "two errors." By so limiting the scope of its ruling, the Appellate Court itself erred. (Appendix A, p. 6.)

Inherent in petitioners' Statement, but apparently not even recognized as such by Mr. Houston, is an additional fundamental error, namely, that under all the facts of this case have not these petitioners been denied *due process of law?* (XIV Amendment, U. S. Const.) It affirmatively appears they have had no opportunity for the fair presentation of their case on the merits in any trial Court.

Under the facts it would seem that *Rule 25(a)(1)*, may also be involved. But in any event it is certain that Mr. Houston believed that only *Rule 41(a)(1)* was applicable.

A Voluntary Dismissal Under Rule 41(a)(1) Was Proper.

The Court did not under the circumstances of this case have any right to treat the facts as being subject to any application of Rule 41(a)(2). Mr. Houston was correct.

(1) *Query:* Therefore, did the Court abuse its discretion in insisting that the case be dismissed only upon conditions as subsequently demanded by defendants?

(2) *Query:* Were the conditions for such dismissal as were thereafter subsequently imposed, in the form of the $4,967.25 cash payment, unreasonable?
(As it turned out, these impoverished petitioners were totally unable to comply with said Order.) [Tr. p. 95.]

(3) *Query:* Had the point of "*no return*" yet been reached on Aug. 30, 1962 from which petitioners through Mr. Houston could then no longer withdraw their offer of voluntary dismissal?

(4) *Query:* Was the posture of the case, at this point, such that on August 30, 1962 the petitioners, acting by Mr. Houston no longer had any control over their attempted dismissal, so that having once offered to dismiss it, they could not withdraw their offer?

ARGUMENT AND BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

A. Abuse of Discretion Appears.

(1) The matter of discretion involved in granting dismissals under *Rule 41(a)* is ably discussed in 54 Columbia L. Rev. 616 at 618 where terms and conditions imposed by other courts under like circumstances is commented upon with cases collected: for example:

In Wilson v. Jolly, 7 F. R. D. 649 (N.D. Tex. 1948) (court costs and witness fees were imposed):

In Gold v. George T. Moore Sons, Inc., 3 F. R. D. 201 (S.D. N. Y. 1943). (defendant requested $350 lawyer's fee, but $250 held reasonable):

In Taylor v. Smith & Co., 2 F. R. D. 424 (S.D. Fla. 1942) ($33.80 court costs and $225 attorney's fee held reasonable):

In Mott v. Conn. Gen. Life Ins. Co., 2 F. R. D. 523 (N.D. Iowa 1942) (court costs plus bond premium plus $100 allowed):

and in De Fillipis v. Chrysler, 116 F. 2d 375 (2 Cir. 1940) (upon which the Appellate Court relied in affirmnig the Judgment appealed from herein).

It was held plaintiff's action would be dismissed with prejudice if such conditions imposed are not complied with.

(2) *However, it may be proper at times to allow plaintiff to dismiss without imposing any conditions:* all of the reasons suggested in support of this view

(see in 54 Columbia L. Rev. *supra* 620 and in particular (note 32) would appear to apply our case since it cannot be denied that substantially all of the expenses which defendants claim [Tr. pp. 70-72], would have been properly allowable to petitioners' proposed second suit in the Hawaiian State Court. *Therrien v. New Eng. Tel. & Tel.*, 102 F. Supp. 350, 351 (D. N.H. 1951).

Furthermore it appears Mr. Houston should have been permitted to withdraw his offer to dismiss when it appeared it could not be done without the imposition of conditions.

This precise problem is considered in 54 Columbia L. Rev. at pages 624-625. Petitioners contend that the "cut off point" had not yet on Aug. 30, 1962 been reached for the following reasons:

(a) The case was not at issue.

(b) No counter claim or request for affirmative relief had yet been pleaded;

(c) It cannot be contended that the expenses incurred in preparing the defense of this case would not have been substantially all equally applicable to the defense of the proposed action in the State court.

It is suggested that the Court's award of $4967.25 was under all of the facts of this case a preposterous award, and that Mr. Houston's picturesque comments on the subject made at the hearing of his motion to Recuse, although intemperate, were still excusable, since they do serve to point up the abuse of discretion in allowing such an Order to stand, when under the circumstances shown, Mr. Houston had every reason to have supposed he was acting under Rule 41(a)(1) only.

B. Dismissal With Prejudice Is a Drastic Sanction.

It should be kept in mind that dismissal with prejudice is a drastic sanction to be applied only in extreme situations.

Independent Productions Corp. v. Loew's Inc. (CA 2d 1960), 283 F. 2d 730, 733.

In *Syracuse Broadcasting Corp. v. Newhouse* (CA 2d 1959), 271 F. 2d 910, a dismissal was reversed.

For, as the Court said in *Gill v. Stolow* (CA 2d 1957), 240 F. 2d 669, 670:

"In the final analysis a Court has the responsibility to do justice between man and man; general principles cannot justify denial of a party's fair day in Court except on serious showing of wilful default."

Also in:

Red Warrior Coal & Mining v. Burdin (CA 3d 1952), 194 F. 2d 578, dismissal with prejudice was reversed as too harsh, and also in *Peardon v. Chapman* (CA 3d 1948), 169 F. 2d 90.

That defendants will be deprived of procedural rights afforded by Federal Rule (even if such should appear) does not constitute such prejudice to defendants as will warrant denial of plaintiffs' motion to dismiss without prejudice even though plaintiffs only motive is to recommence action in a State Court.

Walter v. E. I. DuPont de Nemours & Co., 1 F.R.D. 551.

A host of cases evidence reluctance of the Courts to bar a party from trial on the merits because of errors

of his legal representatives, or to penalize a party for an attorney's error.

Barber v. Turberville (1961), 295 F. 2d 235, 238 (CA 2d 1961).

Barden v. Mahoney (1961), 295 F. 2d 235, 238 (CA 2d 1961).

It appears that in the course of Colloquy Judge Pence also suggested that perhaps petitioners were bound by the "Two dismissal" Rule. It has been held, however, that the "Two dismissal" Rule does not apply where the second dismissal is by Court Order on Motion of plaintiff rather than by Notice.

American Cyanamid Co. v. McGhee (CA 5th 1963), 317 F. 2d 295.

C. Lack of Due Process Appears.

Adequate and proper representation, together with fair trial and a day in Court is a fundamental right guaranteed by the 14th Amendment to the United States Constitution.

Without such an opportunity to be heard, petitioners have not had their day in Court. The dismissal with Prejudice prevents such a hearing.

Since it now plainly appears that these parties have not, by reason of the facts shown by the record, had their day in Court, their constitutional rights have thus been denied them. No fault of their own has been or can be charged to them.

The dismissal should have been allowed without prejudice, and without conditions imposed under *Rule 41(a)-(2)*, or, in the alternative Mr. Houston should have been permitted to withdraw his offer to dismiss without any penalty as he offered to do, or if a penalty was assessed it should have been charged to him, and not to his clients, these petitioners.

D. Are These Petitioners Chargeable With the Misconduct of Their Attorneys.

Subsequently it appears Mr. Houston became disabled.

Where an attorney becomes disabled his contract of employment by his clients is terminated.

Pearces Metro Petroleum, 158 F. Supp. 791, 792.

An attorney is *not* clothed generally with authority to make serious statements of a factual nature in course of any pre-trial hearing except for purpose of simplifying matters.

Laird v. Air Carrier Engine., 263 F. 2d 948.

The relation of attorney and client is one of highest trust and confidence, and demands the utmost of good faith on the part of the attorney and courts will closely scrutinize any transaction in which an attorney has assumed a position antagonistic to his client. Mr. Crumpackers withdrawal deserves further scrutiny under the circumstances.

Goodwin v. Clement, 277 Fed. 586, 51 App. D.C. 184.

Courts may hold an attorney to strict compliance with an improvident contract.

Smith v. Jackson, 37 F. 2d 237 cert. den. 50 sec. 351, 281 U. S. 745, 74 L. ed. 1158.

Apparently Mr. Crumpacker considered his contingent fee contract unprofitable and attempted by any means to escape from it. Are these petitioner appellants therefore actually chargeable with the effect of the *totally unauthorized Dismissal* of their entire litigation?

Unless in some manner excused or avoided, said dismissal has now effectively extinguished their entire claims. Petitioners could not have suspected, or in any manner foreseen that such Dismissal would have been filed by their attorney.

E. The Law Contains Built in Safe Guards.

As appellants contended in their Petition for Rehearing, it would appear that the law contains *built-in safeguards against such contingencies*, and that *no actual foresight was required of them by law in this regard.* It is fundamental that *no attorney can take steps destructive of his clients' entire cause of action without their knowledge, permission or consent.* The authority of an attorney to control litigation entrusted to him is subject to the salutary and well recognized limitation that he *cannot without the consent of his clients take steps destructive of his clients' entire cause of action, and steps so taken are not binding on the clients.*

5 Am. Jur. 300:

Price v. McComish, 22 Cal. App. 2d 92, 97; 70 P. 2d 978:

City and County of San Francisco v. Leroy, 138 U. S. 565, 11 S. Ct. 364, 34 L. Ed. 1096.

For the implied authority of an attorney ordinarily does not extend to the doing of acts which will result

in the surrender or giving up of any substantial right of the clients.

7 C. J. S., Attorney and Client, p. 897:

Clover v. Bradley, 233 Fed. 721, Ann. Cas. 1917A 921.

and certainly no express authority to dismiss was given.

Nor does such implied authority extend to the imposition of new liability upon them without special permission or consent.

7 C. J. S., Attorney and Client, p. 897:

Robert R. Sizer & Co. v. Chiarello Bros., 32 F. 2d 333.

and certainly no express authority to incur the $4,967.25 penalty condition was ever intended.

From the record, the withdrawal or resignation of E. D. Crumpacker as plaintiffs' attorney under the unusual circumstances, appears to have handicapped the effective conduct of petitioners' litigation.

Conclusion and Prayer.

Wherefore, no other recourse remaining, a Writ of Certiorari to the Court of Appeals should issue, to the end that the Judgment and Order in the instant cause may be reviewed.

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Of Counsel:
LAUREN M. HANDLEY.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

Margaret Davis, et al., Appellants, vs. Pauline D. McLaughlin, Administratrix of the Estate of Ingram M. Stainback, deceased, Appellee. No. 18,633. Jan. 22, 1964.

Appeal from the United States District Court for the District of Hawaii.

Before: Barnes, Hamlin and Merrill, Circuit Judges

Barnes, Circuit Judge:

This is an appeal wherein no statement relating to the facts of the case is made by appellants. We therefore adopt appellee's statement of facts, in part, as follows:

"Appellee's intestate, Ingram M. Stainback, was for many years Governor of the Territory of Hawaii.

This action was filed by appellants on December 8, 1961. The gist of appellants' asserted claim, as disclosed by the complaint and Exhibit A thereto (a copy of a Statement of Claim of Creditors made by appellants to, and rejected by, Governor Stainback's administrator) is:

After the death of Governor Stainback's wife, Cecile White Stainback, on October 11, 1949, Governor Stainback destroyed her will, in which she had bequeathed all her property to her parents, and concealed property belonging to her from the administrator of her estate. On February 19, 1952 the net estate of Mrs. Stainback

was distributed one-half to appellants [note] and one-half to Governor Stainback. Governor Stainback died intestate on April 12, 1961.

On January 16, 1962 a notice to take the deposition of appellant Georgia McPheeters was filed. After some difficulty, appellant McPheeters' deposition was taken in Honolulu on Saturday, January 27 and Sunday, January 28, 1962.

On January 31, 1962 appellants filed and served written interrogatories to appellee. Appellee filed answers to these interrogatories on February 26, 1962, and an amended answer on March 9, 1962.

On June 15, 1962, appellee filed a motion to dismiss or for a more definite statement.

On July 2, 1962, the deposition of appellant Georgia McPheeters was filed in the district court.

On July 6, 1962, before any hearing on appellee's motion to dismiss or for a more definite statement, appellants' attorney, E. D. Crumpacker, Esq., filed a motion for leave to withdraw as counsel for appellants. On July 12, 1962 there was a lengthy hearing on Mr. Crumpacker's motion in which appellant McPheeters personally participated. Appellee opposed Mr. Crumpacker's request for leave to withdraw as counsel for appellants. After hearing both Mrs. McPheeters and Mr. Crumpacker, the court conditionally granted Mr. Crumpacker's motion for leave to withdraw but ordered him to notify each appellant other than appellant McPheeters that he had moved to withdraw as their attorney, that there would be a further hearing on his motion to withdraw, and that unless appellants appeared and showed cause why he should not be permitted to

withdraw, he would be so permitted. The court further ordered Mr. Crumpacker to send a copy of appellee's motion to dismiss to each appellant with notice that the motion would be heard at 9:00 A.M. on September 4, 1962. On July 20, 1962 the court granted Mr. Crumpacker leave to withdraw, and a written order to that effect was filed on July 26, 1962.

On August 30, 1962 appellants' present counsel, Brahan Houston, Esq., filed his appearance and a notice of dismissal—purportedly without prejudice under Rule 41(a)(1) of the Federal Rules of Civil Procedure.

The same day—August 30, 1962—that appellants purported to dismiss this action in the district court they commenced in the Circuit Court of the First Circuit of the State of Hawaii a new suit based on the same claim asserted in this action. The defendants in the state court action were Judge McLaughlin as administrator of the estate of Governor Stainback and the Cooke Trust Company, Ltd., which had been administrator of Mrs. Stainback's estate. [note]

On September 7, 1962 appellee moved to strike the notice of dismissal filed by appellants or in the alternative that the court permit dismissal by appellants only on just and reasonable terms and conditions. On September 17, 1962 the district court 'ruled that the notice of dismissal stand, conditioned upon the payment to defendant of his costs, etc., and if an agreement on the amount cannot be reached, then hearing on the matter be set for November 1, 1962 at 9 a.m.' A written order to this effect which also provided that counsel for the respective parties should confer in an attempt to agree on the amount appellants should pay appellee was filed on October 1, 1962.

Appellee filed memoranda of costs and attorneys' fees and affidavits with respect thereto on November 1 and November 8, 1962.

On November 8, 1962, at a continued hearing on the amount of costs and attorneys' fees to be assessed, the district judge made it clear that in his opinion the only basis for a dismissal was under Rule 41(a)(2) of the Federal Rules of Civil Procedure, and that unless otherwise specified in the order of dismissal, such a dismissal would be *without prejudice*. The court set the amount of $4,967.25 as the amount to be paid by appellants to appellee as the condition of a voluntary dismissal without prejudice. On November 29, 1962 a written supplemental order on appellee's motion to strike appellants' notice of dismissal was filed; this order was amended in open court on December 19, 1962. This supplemental order as so amended provides:

> 'IT IS HEREBY ORDERED that the Plaintiffs jointly and severally pay to the Defendant or his legal successor within thirty (30) days from the entry hereof, the sum of FOUR THOUSAND NINE HUNDRED SIXTY SEVEN AND 25/100 DOLLARS ($4,967.25) for the costs and attorneys' fee incurred by Defendant in this matter; and in the event the Plaintiffs shall fail to meet this condition, this cause will stand dismissed with prejudice for failure to comply with terms and conditions of court.'

On November 19, 1962, eleven days after the court had ruled that appellants' dismissal of this action without prejudice was to stand on condition that they pay appellee's costs and expenses in the amount of $4,967.25, appellants filed: (1) a motion to amend the complaint; (2) a document entitled 'Plaintiffs' Election

to Continue On In This Court and Cause'; and (3) motion for Judge Pence to recuse himself 'because of bias and prejudice on the part of the Honorable Martin Pence toward plaintiffs and their cause' together with an affidavit of appellants' attorney in support thereof.

The next day, November 20, 1962, appellants filed a document entitled 'Plaintiffs' Joinder in 'Defendant's Motion to Strike Plaintiffs' Dismissal'.

An affidavit of prejudice by appellant Georgia McPheeters was filed on November 29, 1962. The same day the motion for Judge Pence to recuse himself was denied.

On December 5, 1962 a written order denying appellant's motion for Judge Pence to recuse himself was signed and filed.

Appellants then filed motions to set aside the district court's orders. On December 19, 1962 these motions were denied and, after an extensive colloquy between the court and counsel for appellants, the order dated November 29, 1962 was amended.

On January 9, 1963 this action was ordered dismissed with prejudice for failure of appellants to fulfill the terms and conditions fixed by the court within the prescribed time."

Appellants urge two errors:

(1) That the district judge erred in refusing to recuse himself on motion of appellants;

(2) that the district court erred in dismissing the action with prejudice upon the failure of appellants to meet the terms and conditions imposed by the court to prevent such a dismissal.

Counsel for appellants cite one case in their brief—*Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 1962, 371 U.S. 215, which has to do with what constitutes "excusable neglect" based on a failure of a party to learn of an entry of judgment and hence fail to file a notice of appeal within the thirty day period required by the statute. This court denied appellee's motion to dismiss this appeal on July 8, 1963. Hence the case cited supports our previous action, but has no applicability to the merits of this appeal.

The balance of appellants' brief consists of argument and attacks on the trial judge. It nowhere meets the issues, *i.e.*, the alleged errors recited above.

The motion to recuse was made after the trial judge had heard the matter and indicated how he intended to rule. His refusal to recuse was not error. *L. A. Trust Deed & Mortgage Exchange v. Sec. & Exch. Commission*, 9 Cir. 1960, 285 F. 2d 162, cert. denied 366 U.S. 919; *Barnes v. United States*, 9 Cir. 1956, 241 F.2d 252; *Price v. Johnston*, 9 Cir. 1942, 125 F.2d 806, cert. denied 316 U.S. 677; *Cole v. Loews, Inc.*, S.D.Cal. 1948, 76 F.Supp. 872, reversed on other grounds, 9 Cir. 1950, 185 F.2d 641, cert. denied, 1951, 340 U.S. 954.

The conditional order to dismiss was not error. Fed. R. Civ. P. 41(a)(2). *Federal Savings & Loan Assn. v. Reeves*, 8 Cir. 1945, 148 F.2d 731. Nor was the dismissal with prejudice when the conditions were not met. *De Fillipis v. Chrysler Sales Corp.*, 2 Cir., 1940, 116 F.2d 375.

Affirmed.

(Endorsed) Opinion Filed Jan. 22, 1964.

Frank H. Schmid, Clerk.